No. 11454.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. P. BONHAM, District Director, Immigration and Naturalization Service,

Appellant,

vs.

HELENE EMILIE BOUISS,

Appellee.

BRIEF OF JAPANESE AMERICAN CITIZENS LEAGUE, AMICUS CURIAE.

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Interest of the Japanese American Citizens League.

The Japanese American Citizens League is a national organization of American citizens of every racial descent. It has branches in California, Oregon and Washington. It is concerned with assuring all persons, no matter their ancestry, that they be free from discrimination and prejudice solely because of their race.

Hence, its appearance, with leave of Court, *amicus* urging judicial protection, indirectly, of an American citizen and World War veteran of non-Japanese descent; and, directly, of a Caucasian-Japanese of mixed racial ancestry, from being the victims of illegal administrative racial discrimination.[1]

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[1]This brief is intended not to duplicate any of the arguments made by the appellee, in her brief, on appeal.

ARGUMENT.

The Appellee Is Admissible as the Wife of an United States Citizen Honorably Discharged From the Armed Forces of the United States, Under 8 United States Code, Section 232.

I.

Appellee Is Admissible, Although Ineligible to Citizenship.

The purpose of the statute is thus adequately stated by Judge Paul J. McCormick, the trial judge:

> "This remedial statute was enacted in a post-bellum environment which found millions of the personnel of the armed forces of the Nation in distant and widely separated foreign areas around the globe. Its broad and comprehensive terms clearly state the purpose and object which Congress sought to accomplish by this legislative innovation. The intent to keep intact all conjugal and family relationships and responsibilities of honorably discharged service men of the Second World War is clearly expressed, and the obvious purpose to safeguard the social and domestic consequences of marriage of service men while absent from the United States must take precedence over a generalized phrase which if interpreted along purely racial lines would frustrate the plain purpose of the whole statute. Such a construction should not be adopted." [R. 16.]

On its face, the statute is manifestly directed toward the wide and full protection of the American soldier, who, as the incidence of war (without request, or even con-

sent) found himself on America's farflung battlefronts.[1a] Congress had declared war on Japan, as well as on Germany and Italy. On December 28, 1945, when it enacted the instant statute, Congress knew that American soldiers were in Japan as part of the American occupation forces; as they were in Germany, and Congress

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[1a]Some of the legislation designed for the benefit of the members of our armed forces in World War II are:

1. Servicemen's Readjustment Act (GI Bill of Rights) (38 U. S. C. 693 *et seq.*).
2. Soldiers and Sailors Civil Relief Act of 1940 (50 U. S. C. 501 *et seq.*).
3. National Service Life Insurance Act of 1940 (38 U. S. C. 801 *et seq.*).
4. Service Extension Act (50 U. S. C. A. App., Sec. 353).
5. Mustering Out Payment Act of 1944 (38 U. S. C. 691 *et seq.*).
6. Retraining and Re-employment Provisions:
   a. Vocational Rehabilitation Act, 29 U. S. C., Secs. 31-41.
   b. Selective Training and Service Act (50 U. S. C. A. App. 308).
   c. Service Extension Act (50 U. S. C. A. App., Secs. 351, 352, 354, 356, 357, 360).
   d. Army Reserve and Retired Personnel Service Law (50 U. S. C. A. App., Sec. 403).
7. Veterans' Preference Act of 1944 (5 U. S. C. A. 851-869).
8. Surplus Property Act of 1944 (50 U. S. C. A. App., Secs. 1611, 1612, 1625, 1632).
9. Income Tax Preferences (26 U. S. C., Secs. 22, 421, 3804, 3808).
10. Servicemen's Dependants Allowance Act of 1942 (37 U. S. C., Secs. 201-221).
11. Seeing-Eye Dogs (38 U. S. C. 251).
12. Preferences as to Public Lands (43 U. S. C., Secs. 279-283, 682a).
13. Housing (42 U. S. C. 1571-1573).
14. Disability Compensation and Pensions, *e.g.*, 38 U. S. C. 41.
15. Naturalization Rights in addition to the provision being considered in this case (8 U. S. C. 724, 10001, *et seq.*).
16. Additional eligibility for admission to U. S. Military and Naval Academy (34 U. S. C., Secs. 1091a, 1091e, 1094, 1036a, 1038, 1045).

knew too, that the American occupation of Japan might last many years—just as long, if not longer, than the occupation of Germany. Section 232, accordingly, contains no express racial discrimination against American war-brides coming from Japan.

Indeed, the House Report on the Bill, resulting in Section 232 (Report No. 1320, 79th Congress, First Session, House of Representatives) discloses no suggestion that Japanese-born wives of American soldiers, or other non-white wives, be treated any differently from Caucasian brides. The purpose of the Bill is thus stated in the Report:

> "The purpose of the bill is to expedite the admission to the United States of thousands of alien brides who were married to our soldiers while the latter were serving abroad in the United States armed forces during the Second World War."

Its objective is thus set forth:

> "The sole objective of the bill is to expedite the admission to the United States of the alien spouses and alien minor children of citizen members who are serving or have served honorably in the armed forces of the United States during World War II."

The Report further recites:

> "It is estimated there are approximately 75,000 to 100,000 spouses of American service people throughout the world and that approximately 40,000 to 55,000 will come from Great Britain."

It further states:

> "One of the reasons for the introduction of this measure is due to the fact that it is believed such

strong equities run in favor of these service men and women in the right of having their families, with them that cases certified for physical or mental reasons would eventually be admitted to the United States, either through the authority vested in the administrative officers to admit aliens temporarily, or through the medium of private bills introduced in the Congress."

If discrimination against American soldiers marrying certain alien spouses, of specified racial groups, is to be held judicially to be intended by the statute, the courts must read such discrimination into the statute, rather than apply its broad beneficial provisions, designed to protect all American soldiers wherever stationed.

(a) Section 232 Should be Construed Consistently With Recent Congressional Policy Against Race Discrimination.

In determining the intent of Congress in the enactment of Section 232, the general recent policy of Congress against race discrimination is to be noted—a policy which reflects itself in recent consistent amendments to the Naturalization Law, all designed to limit, if not entirely to eliminate racial distinctions.

Thus, when the Naturalization Act was incorporated in the Nationality Act in 1940, American Indians, who had been theretofore excluded were included, as were Filipinos having honorable service in the United States Army (8 U. S. C. 703). By a 1943 amendment to Section 703 (57 Stat. 601), persons of Chinese descent are now eligible to citizen-

ship; and more recently, July 2, 1946 (60 Stat. 534) the law was further amended so as to eliminate the discrimination against Hindus and Filipinos generally.

In addition, Congress has now eliminated race, as a complete and insurmountable bar to naturalization by the adoption of Section 724 and Section 1001 of the 8 U. S. Code. These sections[2] permit aliens of all races, upon service in the Armed Forces (Section 724, after three years; Section 1001, during the Second World War) to become American citizens, despite, and without any relationship to, their racial origin.

Therefore, to permit the exclusion of the appellee, is to construe Section 232, as running counter to the Congressional policy above set forth; and is entirely inconsistent with that policy.

(b) Section 232 Should be Construed Consistently With Our Constitutional Policy Against Racial Discrimination.[3]

(1) Our Constitutional Policy.

It is the mandate of our Constitution that racial discrimination is warranted only "under circumstances of direct emergency and peril" (*Korematsu*

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[2]*Cf. Re Fong Chew Chung,* 149 F. (2d) 904 (this Court), upholding and enforcing Sec. 1001.

[3]*Cf. James v. Marinship Corp.,* 25 Cal. (2d) 721, 739, holding that discrimination by a labor union against negro unions to be: "Contrary to the public policy of the United States" as well as the policy of the State of California; and that such discrimination was in violation of "a definite national policy against discrimination because of race or color." (p. 740.)

v. United States, 323 U. S. 214, 220.)[4] Both overt and subtle discrimination are equally unconstitutional.[5]

For it has been decided that "loyalty is a matter of the heart and mind, not of race, creed or color." (*Ex parte Endo,* 323 U. S. 283, 302.)[6]

In the instant case, as in that of *Ex parte Kawato,* 317 U. S. 69, 71, there is nothing in this record (that) indicates, and we cannot assume that he (she) came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his (her) home and work in a free country, governed by just laws, which promise equal protection to all who abide by them.

Although dissenting in result, Justice Murphy best expressed the views of the Supreme Court upon the

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[4]*Cf.* Excellent statement of the principle by Judge Paul J. McCormick, in *Mendez v. Westminster School District,* 64 Fed. Supp. 544, 548: "Distinctions of that kind have recently been declared by the highest judicial authority of the United States' by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' They are said to be 'utterly inconsistent with American traditions and ideals.' *Gordon Kiyoshi Hirabayashi v. United States,* 320 U. S. 81, 63 S. Ct. 1375, 1385, 87 L. Ed. 1774." (The case is on appeal, No. 11310, but the appeal involves a procedural point only.)

[5]See *Lane v. Wilson,* 307 U. S. 268; *Hill v. Texas,* 316 U. S. 401; *Norris v. Alabama,* 294 U. S. 591.

[6]The loyalty of persons of Japanese descent was directly recognized by the Supreme Court, in *Ex parte Endo* (323 U. S. at p. 304) in its quotation, with approval, from President Roosevelt: "Americans of Japanese ancestry, like those of many other ancestries, have shown that they can, and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and well-being. In vindication of the very ideals for which we are fighting this war it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities."

unconstitutionality of racial discrimination when he concluded his opinion in the *Korematsu* case, thus (p. 242):

"Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kind in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States."[7]

(2) To Effectuate Our Constitutional Policy Eschewing Racial Discrimination, the Courts Will Enjoin Such Discrimination in a Statute, Not Expressly Providing for Such Discrimination.

Thus, by way of example, in *Steele v. L. & N. R. Co.*, 323 U. S. 192, 203, a labor organization, acting under authority of a federal statute, was enjoined from practicing racial discrimination, although the federal statute did not provide for such discrimination; and, on the contrary, was entirely silent on the subject.

The Supreme Court upset the practice of racial discrimination because "here the discriminations

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[7]Deprivation of liberty because of a particular racial origin, according to Justice Murphy concurring in *Hirabayashi v. United States*, 320 U. S. 81, 111: ". . . bears a melancholy resemblance to the treatment accorded to the members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purpose of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry."

based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. *Cf. Yick Wo v. Hopkins,* 118 U. S. 356; *Yu Cong Eng v. Trinidad,* 271 U. S. 500; *Missouri ex rel Gaines v. Canada,* 305 U. S. 337; *Hill v. Texas,* 316 U. S. 400."

Justice Murphy concurred, protesting the "cloak of racism" to which the labor union resorted to, and concluding: "Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation." (*Steele v. L. & N. R. Co.,* 323 U. S. 192, 209.)

Mitchell v. United States, 313 U. S. 80, 95, is to the same effect. Although no federal statute barred racial discrimination in interstate commerce, the Supreme Court held provisions of a state statute, permitting such discrimination, to be invalid, as improper burdens upon interstate commerce.

(3) Since Section 232 Contains No Express Racial Discrimination It Should be Construed as Permitting No Discrimination Because of Race.

In the instant case, the construction of the statute by the immigration authorities results in a distinction between American citizens with respect to their right to have a spouse join them in the United States.[8]

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[8]On its face, the statute, manifestly, provides for no such racial discrimination.

The citizen is thus deprived of the full enjoyment of the right of consortium [8a] solely on racial grounds; as in some other situations, the citizen's right is affected by a prohibition or restriction which in terms is directed at an alien relative. *Cf. Estate of Yano,* 188 Cal. 545, 206 Pac. 995.[9]

Congress is not to be deemed to have intended to impose a racial distinction unless it unequivocally expresses this intention; for a statute is not to be construed so as to detract from any of the Constitutional principles unless no other construction is possible. (See *Ex parte Endo,* 323 U. S. 283.)

Here Congress has not, as in the statute involved in *Chang Chan v. Magle,* 268 U. S. 346,[10] referred to specific provisions of other laws; it has instead used a general expression which is capable of either a broad or narrow construction. The narrow construction must be accorded to it, because the broader one infringes upon the constitutional right to be free from racial discrimination.

[8a]That the right to consortium is a fundamental and valuable rights, see 26 Am. Jur. 645, Husband and Wife, Sec. 15, and cases cited.

[9]*Cf. Truax v. Raich,* 239 U. S. 33; *Buchanan v. Warley,* 245 U. S. 60; and *Nixon v. Herndon,* 273 U. S. 536. In all these cases, one individual's constitutional rights were held to be violated by virtue of the effect upon him of a prohibition imposed on another associated individual.

[10]The *Chang Chan* case, moreover, did not concern itself with a special war-time statute designed broadly to protect the American soldier and veteran—a purpose which would be frustrated if discrimination against certain American soldiers, because of the race of their wives, is permitted.

Moreover, the adoption of appellant's argument would lead to the following judicial result: The alien Japanese wife of an alien

II.

Appellee Is Admissible Because Eligible to Citizenship Under Sec. 724, 8 U. S. Code.

Under provisions of Sec. 724, 8 U. S. C., the appellee is now no longer completely ineligible to citizenship merely because of her race. Upon entry into the United States, she may, along with all other aliens of Japanese descent, if she is accepted for service in the Armed Forces, become a citizen, after three (3) years honorable service.

As indicated, there is nothing in the instant record, as there was not in the record in *Ex parte Kawato,* 317 U. S. 69, 71, that she came to America "for any purpose different than what prompted millions of others to seek our shores—a chance to make his (her) home and work in a free country, governed by just laws, which promise equal protection to all who abide by them."

She, like the others mentioned in *Schneiderman v. United States,* 320 U. S. 118, 120, seeks "refuge in the new world from cruelty and oppression of the old."[11]

(2) *Ozawa v. United States,* 260 U. S. 178, and companion cases are erroneously decided and should be overruled.

Japanese professor or minister may be admitted to the United States to accompany or follow the latter (Sec. 13c (8 U. S. C., Sec. 213)), and (Sec. 4 (8 U. S. C., Sec. 204)); while an alien Caucasian-Japanese wife of an honorably discharged American soldier may not, similarly enter the United States.

[11]While Japan is now in the process of being democratized by our armed forces, it manifestly will be many years before Japan will recover from the ravages of war and the suffering and, at times, starvation, which is the present lot of the people of Japan—a lot which the courts ought not to visit upon an ex-GI's war bride, unless inexorably required by express Congressional mandate.

(We realize that this Court may not overrule the *Ozawa* and companion cases. That task is for the Supreme Court alone. We urge the point, however, so that it is timely raised, in the event this cause should reach the Supreme Court of the United States.)

(3) 8 U. S. Code, Section 703(4) is unconstitutional because unreasonable.

(We deem the foregoing point to be unnecessary to a ruling by this, or the Supreme Court of the United States, affirming the judgment below. Should either this Court, or the Supreme Court, reach the above point, it is our position that Setcion 703(4) is unconstitutional because unreasonable.)

Conclusion.

Already this nation has committed itself generally, as a signatory to the United States Charter to the protection of "human rights and fundamental freedom for all, without distinction as to race, sex, language or religion." More particularly, thus far, by armed force, we have induced the present Japanese government to adopt a "Japanese Bill of Rights," and directing it to "remove restrictions on political, civil and religious liberties and discriminations on the grounds of race, nationality, creed or political opinion . . ."[12]

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[12]"Occupation of Japan," Department of State Publication, United States Government Printing Office, Washington, D. C., p. 19.

And we have assured that the present Japanese Constitution provides,

> "All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin."[13]

It is respectfully suggested that our judicial policy be consistent with our national policy—and that both, equally, should not tolerate discrimination because of race.

Respectfully submitted,

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[13]Article XIII, Japanese Constitution, *ibid.*, at p. 120.